

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
RCC HOLDINGS, INC.)	
)	CC Docket No. 96-45
Petition for Designation as an)	
Eligible Telecommunications Carrier)	
in the State of Alabama)	
To:		The Commission

REPLY TO RESPONSE TO MOTION TO DISMISS

RCC Holdings, Inc. ("RCC"), by its attorneys and pursuant to § 1.45(c) of the Commission's Rules ("Rules"), hereby replies to the Response to Motion to Dismiss ("Response") filed by the Alabama Rural Local Exchange Carriers ("ARLECs") in the above-captioned proceeding.

We cannot disagree with the ARLECs' interpretation of the public notice by which the Wireline Competition Bureau ("Bureau") invited parties to "update" the record in proceedings involving the designation of eligible telecommunications carriers ("ETCs"). *See Parties are Invited to Update the Record Pertaining to Pending Petitions for ETC Designations*, DA 04-999, at 1 (Wireline Comp. Bur. Apr. 12, 2004) ("*Update PN*"). The notice was confusing insofar as it was wholly inconsistent with the Rules, both as to its issuance and its substance.

The Bureau purported to act pursuant to §§ 1.415 and 1.419 of the Rules. *See Update PN*, at 2. However, §§ 1.415 and 1.419 apply only in "notice and comment rulemaking proceedings conducted under 5 U.S.C. 553." 47 C.F.R. § 1.399. The process of designating an ETC under § 214(e)(6) of the Communications Act of 1934, as amended ("Act") is not a rulemaking under § 553 of the Administrative Procedure Act ("APA").

Section 254(a) of the Act provides that "only an [ETC] designated under section 214(e) shall

be eligible to receive specific Federal universal service support.” 47 U.S.C. § 254(a). Designation as an ETC is a “license” under the APA, because it serves as the Commission’s “permit, certificate, approval . . . or other form of permission” to receive federal universal support. 5 U.S.C. § 551(8). The process by which the Commission grants a “license” to receive universal service support constitutes “licensing” under the APA. *Id.* § 551(9). Thus, a proceeding to designate an ETC is a “process for the formulation of an order,” *id.* § 551(7), “in a matter other than rule making but including licensing.” *Id.* § 551(6). Therefore, the ETC designation process is an “adjudication” under the APA. *See id.* § 551(7).

The process by which the Bureau granted RCC’s petition for designation, *see RCC Holdings, Inc.*, 17 FCC Rcd 23532, 23549 (Wireline Comp. Bur. 2002), was an informal adjudication under § 555 of the APA. *See* 5 U.S.C. § 555(b), (e). For that reason, the notice and comment rulemaking procedures of Subpart C of Part 1 of the Rules, including §§ 1.415 and 1.419, did not apply in this case. *See* 47 C.F.R. § 1.399.

Regardless of the nature of the proceeding before the Bureau, the ARLECs filed their application for Commission review explicitly under the provisions of § 1.115 of the Rules. *See* Application for Review of the ARLECs, CC Docket No. 96-45, at 1 (Dec. 23, 2002). Accordingly, the filing triggered the procedural requirements of § 1.115 generally, and the pleading deadlines of § 1.115(d) specifically.

The Commission must abide by its own rules, *see, e.g., Reuters Limited v. FCC*, 781 F.2d 946, 947 (D. C. Cir. 1986), including rules of procedure. *See Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976). Thus, absent a rule waiver, the Commission was bound by the requirement of § 1.115(d) that an application for review of the Bureau’s order in this case, and any supplement

thereto, “shall be filed within 30 days of public notice of such action.” 47 C.F.R. § 1.115(d). Also bound by the Rules, and without authority to act on applications for review of its own actions, *see id.* § 0.291(d), the Bureau could not invite the ARLECs to supplement their pending application for review after the 30-day deadline set by § 1.115(d). Nor could it establish a pleading cycle under §§ 1.415 and 1.419, when subsections (d) and (f) of § 1.115(d) governed the pleadings in this case.

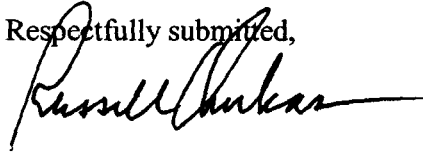
The Bureau’s failure to adhere to the Rules is prejudicial to RCC. By its departure from the Rules, the Bureau may have effectively: reopened the proceeding to permit non-parties to participate, *but see* 47 C.F.R. § 1.115(a); allowed parties to raise questions of law or fact upon which it had been afforded no opportunity to pass, *but see id.* § 1.115(c); invited the filing of unauthorized and untimely pleadings, *but see id.* § 1.115(d); and opened a restricted proceeding to *ex parte* presentations. *But see id.* § 1.1208.

From a procedural standpoint, this case is floundering. We are uncertain as to what must be done to get the proceeding back on course. The ARLECs suggest that the supplement to their application for review is properly on file, but that the supplemental information RCC filed is not. *See* Response, at 1. That RCC was confused by the *Update PN* does not make the ARLECs’ supplement timely-filed or excuse their failure to belatedly request a waiver of § 1.115(d) or seek leave to file their pleading. In contrast, RCC may not have followed the Bureau’s departure from § 1.115, but it violated no rule.

The ARLECs erred when they claim that RCC has until May 28, 2004 to “comment” on the supplement to their application for review. *See id.* In fact, RCC has the right under § 1.115(d) to file an opposition to the supplemented application for review. *See* 47 C.F.R. § 1.115(d). The 15-day filing period for the opposition will expire on June 1, 2004. *See id.* §§ 1.4(j), 1.115(d). RCC is

planning to filing its opposition on that date.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Russell D. Lukas", written over the typed name.

RUSSELL D. LUKAS
DAVID A. LAFURIA
STEVEN M. CHERNOFF

LUKAS, NACE, GUTIERREZ & SACHS, Chartered
1111 19th Street, N.W., Suite 1200
Washington, D.C. 20036
(202) 857-3500

Attorneys for RCC Holdings, Inc.

May 28, 2004

CERTIFICATE OF SERVICE

I, Linda J. Evans, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this 28th day of May, 2004, placed in the United States mail, first-class postage pre-paid, a copy of the foregoing *Reply to Response to Motion to Dismiss* filed today to the following:

Ronald L. Ripley, Esq.
14201 Wireless Way
Oklahoma City, OK 73134
Counsel for Dobson Communications Corporation

Tonya Rutherford
Latham & Watkins LLP
555 11th Street, NW, Suite 1000
Washington, DC 20004
Counsel for CenturyTel of Alabama, LLC

Heather H. Grahame, Esq.
Dorsey & Whitney LLP
1031 West Fourth Ave., Suite 600
Anchorage, AK 99501
Counsel for Alaska Telephone Association

TCA, Inc.
1465 Kelly Johnson Blvd., Suite 200
Colorado Springs, CO 80920

Richard A. Finnigan, Esq.
Law Office of Richard A. Finnigan
2405 Evergreen Park Drive, SW, Suite B-1
Olympia, WA 98502
Counsel for OTA and WITA

Fred Williamson & Associates, Inc.
2921 East 91st St, Suite 200
Tulsa, OK 74137

Jill Canfield
National Telecommunications Cooperative Association
4121 Wilson Blvd., 10th Fl
Arlington, VA 22203

Eric F. Swanson, Esq.
Winthrop & Weinstine, P.A.
30 E. 7th Street
3200 Minnesota World Trade Center
St. Paul, MN 55101
Counsel for Minnesota Independent Coalition MIC

Woods & Aitken LLP
301 S. 13th Street, Suite 500
Lincoln, NE 68508
Counsel for The Nebraska Rural Independent Telephone Companies

Stuart Polikoff
OPASTCO
21 Dupont Circle, NW, Suite 700
Washington, DC 20036

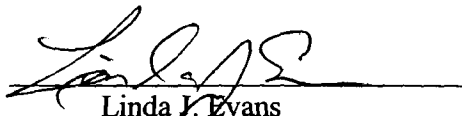
Leah S. Stephens, Esq.
Mark D. Wilkerson, Esq.
Wilderson & Bryan, P.C.
P.O. Box 830
Montgomery, AL 36101

Eric Einhorn, Chief
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 5-C360
Washington, D.C. 20554

Diane Law Hsu, Deputy Chief
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 6-A360
Washington, D.C. 20554

Anita Cheng, Assistant Chief
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 5-A445
Washington, D.C. 20554

Thomas Buckley, Esq.
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room
Washington, D.C. 20054



Linda J. Evans